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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. FREDERICK LEE JOHNSON, Defendant and Appellant.	B291715 (Los Angeles County Super. Ct. No. TA058872)

APPEAL from an order of the Superior Court of Los Angeles County. William C. Ryan, Judge. Affirmed.

Richard B. Lennon, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Frederick Lee Johnson (defendant) appeals from an order denying his Proposition 36 petition for resentencing. He contends that the trial court erred in finding him ineligible for resentencing, and that as a matter of law, the "armed with a firearm" exception to eligibility does not apply to the offense of felon in possession of a firearm. We disagree and affirm the order.

BACKGROUND

In 2003, defendant was convicted by a jury of shooting at an inhabited dwelling, in violation of Penal Code section 246[1] (charged as count 2), and of being a felon in possession of a firearm, in violation of former section 12021, subdivision (a)(1)[2] (charged as count 3). Four prior "strike" allegations were found true within the meaning of the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), as well as a prior serious felony allegation (§ 667, subd. (a)), and a prior prison term allegation (§ 667.5, subd. (b)). The trial court sentenced defendant to a consecutive indeterminate prison term of 25 years to life as to each count, plus a determinate term of five years. The judgment was affirmed on appeal. (*People v. Johnson* (Aug. 24, 2004, B167215) [nonpub. opn.].)

In 2012, the voters passed Proposition 36, the Three Strikes Reform Act of 2012 (Act or Proposition 36), which permits resentencing of any person serving a third-strike sentence whose current conviction is for a felony which is not a

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1 All further statutory references are to the Penal Code, unless otherwise indicated.

2 See now, section 29800, subdivision (a).

serious or violent felony, as defined in section 667.5, subdivision (c), or section 1192.7, subdivision (c). (§ 1170.126, subd. (b).) In late 2014, defendant petitioned for resentencing on count 3, felon in possession, on the ground that such offense, whether charged under section 29800, subdivision (a), or former section 12021, subdivision (a)(1), is not defined as a violent or serious felony in the statutory definitions. The superior court denied the petition, finding that defendant was ineligible for resentencing because count 2 of the same information, shooting at an inhabited dwelling, was a serious felony, as defined in section 1192.7, subdivision (c)(33).

Defendant appealed from the trial court's order denying the petition, and during pendency of the appeal, the California Supreme Court held that a Proposition 36 petition must be evaluated on a "count-by-count basis"; thus, "resentencing is allowed with respect to a count that is neither serious nor violent, despite the presence of another count that is serious or violent." (*People v. Johnson* (2015) 61 Cal.4th 674, 688, 695.) Relying on this holding, this court conditionally reversed the order and remanded the matter to the superior court to make further eligibility determinations. (*People v. Johnson* (Feb. 3, 2016, B260641) [nonpub. opn.].) We noted that an offense which not a serious or violent felony will nevertheless render the petitioner ineligible for resentencing if the offense comes within one of the exceptions to eligibility. (*Id.* at p. 6 [B260641]; see § 1170.126, subd. (e); *People v. White* (2014) 223 Cal.App.4th 512, 522 (*White*).) As relevant here, one of those exceptions applies when "[d]uring the commission of the current offense, the defendant . . . was armed with a firearm or deadly weapon." (§§ 1170.12, subd. (c)(2)(C)(iii), 667, subd. (e)(2)(C)(iii), 1170.126, subd. (e)(2).) We

thus directed the trial court to affirm its order "if defendant committed possession of a firearm by felon while 'armed with a firearm'"; or to reverse, "grant the petition and hold further proceedings if the . . . defendant was not so armed and resentencing would not pose an unreasonable risk of danger to public safety." (*People v. Johnson*, *supra*, B260641, at p. 7.)

On remand, the parties submitted the matter on the pleadings and attached exhibits, which included a transcript of the trial testimony presented in support of the subject offenses, as well as the opinion of the Court of Appeal affirming defendant's judgment of conviction. The trial court found beyond a reasonable doubt that defendant had been armed with a firearm during the commission of the offense of being a felon in possession of a firearm, and thus ineligible for resentencing.

The trial court denied the petition and issued a memorandum decision setting forth factual findings which are undisputed here. In essence, the trial court found that the evidence showed that defendant fired multiple shots from a handgun into an inhabited dwelling, and the same day, he and his girlfriend drove to a motel where they spent the night. They left the next day, but soon returned when defendant realized that he left his gun in the motel room. However, the police had already recovered the weapon. A firearms expert determined that shell casings recovered from the scene of the shooting had been ejected from the handgun found in defendant's motel room, and that bullet fragments found at the scene of the shooting could have been fired from the handgun found in the motel room.

Defendant filed a timely notice of appeal from the order denying the resentencing petition.

DISCUSSION

Defendant contends that as a matter of law, the "armed with a firearm" exception to eligibility for resentencing does not apply to the offense of felon in possession of a firearm.

We disagree, as have other courts of appeal faced with the same contention. (See *People v. White* (2016) 243 Cal.App.4th 1354, 1362-1364; *People v. Hicks* (2014) 231 Cal.App.4th 275, 283-284 (*Hicks*); *People v. Brimmer* (2014) 230 Cal.App.4th 782, 797 (*Brimmer*); *People v. Elder* (2014) 227 Cal.App.4th 1308, 1312-1314, 1317 (*Elder*); *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1032 (*Osuna*), disapproved on another ground in *People v. Frierson* (2017) 4 Cal.5th 225, 240, fn. 8; *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1054 (*Blakely*); *White, supra*, 223 Cal.App.4th at pp. 525-526.) A defendant is ineligible for resentencing if he was *armed* with a firearm during the commission of the offense for which he seeks resentencing. (§§ 1170.12, subd. (c)(2)(C)(iii), 667, subd. (e)(2)(C)(iii), 1170.126, subd. (e)(2).) The offense of possession of a firearm by a felon is committed the moment the felon has a firearm within his control, even if it is not in his actual possession; however, the felon is "armed" with the firearm when it is not only in his possession but also "readily available to him for offensive or defensive use." (*Blakely*, at pp. 1051-1052.)

Defendant invites us to disagree with the above-cited cases, arguing that the armed exclusion cannot apply because arming satisfies an essential element of the underlying offense. He reasons that the exclusion applies only where the arming is "tethered" to another offense, such that there is a "facilitative nexus" between the arming and the other offense, meaning that the firearm facilitates the commission of that separate offense.

The courts of appeal have consistently rejected such arguments, holding that the arming need not be tethered to another offense, and that the armed exclusion requires only a temporal nexus, not a facilitative one. (See *People v. Cruz* (2017) 15 Cal.App.5th 1105, 1111-1112 (*Cruz*); *People v. Valdez* (2017) 10 Cal.App.5th 1338, 1349-1350, 1356 (*Valdez*); *People v. Frutoz* (2017) 8 Cal.App.5th 171, 175-176, 177-178; *People v. White, supra*, 243 Cal.App.4th at pp. 1362-1363; *Hicks, supra*, 231 Cal.App.4th at pp. 283-285; *Brimmer, supra*, 230 Cal.App.4th at pp. 792-793, 798-799; *Elder, supra*, 227 Cal.App.4th at pp. 1312-1314, 1317; *Osuna, supra*, 225 Cal.App.4th at p. 1032; *White, supra*, 223 Cal.App.4th at p. 525.) We decline defendant's invitation to disagree with these authorities.

We note that the California Supreme Court has also construed section 1170.12, subdivision (c)(2)(C)(iii) as providing only a temporal nexus requirement, and has concluded that "section 1170.12, subdivision (c)(2)(C)(iii) is best read as excluding from resentencing 'broadly inclusive categories of offenders who, during commission of their crimes -- and regardless of those crimes' basic statutory elements -- used a firearm, were armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person.' [Citation.]" (*People v. Estrada* (2017) 3 Cal.5th 661, 670 (*Estrada*), quoting *Blakely, supra*, 225 Cal.App.4th at p. 1055.)[3]

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[3] We find *Estrada* persuasive and thus reject defendant's suggestion that we give our high court's construction of the statute no weight because it was made in relation to a different issue. The issue there was whether the trial court may base a finding of ineligibility on facts underlying previously dismissed counts. (See *Estrada, supra*, 3 Cal.5th at p. 665.) Defendant also

We agree with established case law that a defendant is armed and ineligible for resentencing for a conviction of unlawful possession of a firearm if he had ready access to a firearm "'*during* the commission of ' the current offense . . . or 'at some point in the course of [the offense.]' [Citation.]" (*Osuna, supra*, 225 Cal.App.4th at p. 1032; §§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii); see also *Cruz, supra*, 15 Cal.App.5th at p. 1111; *Valdez, supra*, 10 Cal.App.5th at pp. 1349-1353; *Hicks, supra*, 231 Cal.App.4th at pp. 284-285; *Brimmer, supra*, 230 Cal.App.4th at pp. 798-799.)

Although defendant does not dispute the trial court's factual findings, he attempts to characterize the relevant facts as showing no more than his having left a gun in a motel room. A temporal focus "on the defendant's proximity to the weapon at the time the police found it [is] too narrow. [Citation.]" (*Valdez, supra,* 10 Cal.App.5th at p. 1347.) Possession of a firearm is a continuing offense which extends "'throughout the entire time the defendant asserts dominion and control.' [Citation.] Thus, even if it is true that the weapon was not in defendant's actual physical possession *at the precise time it was discovered*, this does not necessarily undermine a finding that he was armed with the deadly weapon at other relevant times so as to support the trial court's determination." (*Id*. at p. 1348, italics added.) The undisputed facts not mentioned by defendant showed that defendant was in physical possession of the firearm when he fired

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notes that the court stated in a footnote: "Whether the use, arming, and intent described in section 1170.12, subdivision (c)(2)(C)(iii) must have a more-than-coincidental relationship to the current offense is a question we have no occasion to consider here." (See *Estrada*, at p. 670, fn. 4.)

it at an inhabited dwelling, drove to the motel, and while he was in a motel room. Defendant not only had ready access to the firearm for offensive or defensive use while he was unlawfully in possession of it, he in fact used it offensively. We conclude that the trial court correctly found that defendant was armed during the commission of the crime of being a felon in possession of a firearm, and was thus ineligible for resentencing under section 1170.126.

DISPOSITION

The order of the superior court denying defendant's petition for resentencing is affirmed.

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_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT